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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)	
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Filing Date: October 25, 2017)	Case No.: PSH-17-0073
)	
_____)	

Issued: March 9, 2018

Administrative Judge Decision

Gregory S. Krauss, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXXXXXX (hereinafter referred to as “the individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual’s security clearance should be restored.²

I. Background

The individual is an employee of a DOE contractor in a position that requires him to hold a security clearance. A background investigation completed on February 7, 2017, by the Office of Personnel Management, revealed that the individual’s spouse is an undocumented Mexican national residing in the United States. Exhibit (“Ex.”) 4 at 1. On March 16, 2017, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual. During the PSI, the Individual confirmed that his wife is a Mexican national without legal status in this country. Ex. 5 at 155, 185.

The individual’s close association with a foreign national raised security concerns that the PSI did not resolve. Accordingly, the LSO began the present administrative review proceeding by issuing a Notification Letter to the individual informing him that his security clearance had been suspended. The Notification Letter further informed him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility for a security clearance. *See* 10 C.F.R. § 710.21. The individual requested a hearing and the LSO forwarded the

¹ “Access authorization” is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/OHA>.

individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed Wade M. Boswell as the Administrative Judge in this matter on November 6, 2017.³ At the hearing that Judge Boswell convened on January 30, 2018, pursuant to 10 C.F.R. § 710.25(d), (e) and (g), he took testimony from the individual. The LSO submitted five exhibits, marked as DOE Exhibits 1 through 5. The individual did not submit any exhibits. On February 7, 2018, the Director of OHA appointed me as the Administrative Judge in this matter.⁴

II. Regulatory Standard

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. §710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "will not endanger the common defense and security, and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

III. The Notification Letter and the Associated Security Concerns

As indicated above, the Notification Letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guideline B and E of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) ("Adjudicative Guidelines").

³ The Director of OHA initially appointed Robert B. Palmer as the Administrative Judge in this matter. The OHA Director reassigned this matter to Judge Boswell following Judge Palmer's retirement from the DOE.

⁴ The matter was reassigned to me due to Judge Boswell's retirement from the DOE. I attended the hearing in anticipation of the possibility that Judge Boswell's retirement might occur before he could render a decision. The decision I have reached in this matter is a result of my own analysis of the evidence as well as my consultations with Judge Boswell.

Guideline B of the Adjudicative Guidelines regards concerns about foreign influence. Guideline B provides that foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. Guideline B at ¶ 6. Such contacts and interests may also be a national security concern if they create circumstances in which an individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest.

In citing Guideline B, the LSO indicated that security concerns exist because the individual admitted during his PSI that he is bound by affection toward his spouse, a foreign national from Mexico who is illegally residing in the United States.⁵ The LSO further raised a security concern about the individual's admission in his PSI that he has been providing financial support to his spouse since they married and began living together. In addition, the LSO cited concerns arising from an "unfavorable assessment" in a memorandum issued on May 11, 2017, by the DOE's Office of Intelligence and Counterintelligence ("Counterintelligence Memorandum").⁶ After a review of the exhibits in this case, I find that the LSO had sufficient grounds to invoke Guideline B.

Guideline E of the Adjudicative Guidelines regards personal conduct. Under Guideline E, conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. In citing Guideline E, the LSO referred to the individual's continued provision of financial support to his wife despite his awareness, as he stated in his PSI, that she was residing in the United States without proper documentation. The LSO also cited the individual's continued association with his wife despite his awareness, as he indicated in his PSI, that she was detained at the border in either 2004 or 2007. After a review of the exhibits, I find that the LSO had sufficient grounds to invoke Guideline E.

IV. Findings of Fact

The individual's wife is a Mexican national who resides in the United States without proper documentation. *See* Transcript of Hearing, Case No. PSH-17-0073 (hereinafter cited as "Tr.") at 14; Ex. 5 at 155, 185; Ex. 4 at 1-2. The individual met his wife in September 2015 and became engaged to her in December 2015. Tr. at 13-14; Ex. 5 at 161. They married in May 2016. Tr. at 14.

The individual's wife has two sisters who live in the United States. Tr. at 28; Ex. 5 at 150-151. Around 2004, following the death of her father, she moved to the United States to live with her sisters in New Mexico. Tr. at 28; Ex. 5 at 150. Around 2007, her mother became ill and she returned to Mexico. Tr. at 28. After her mother passed away, she came back to the United States to be with her sisters. Tr. at 29. She has resided in the United States since 2007. Tr. at 29. The Counterintelligence Memorandum indicates that the individual's wife has previously been detained

⁵ The Notification Letter describes the individual's wife as "illegally residing" in the United States and as "residing illegally" in this country. For the purposes of this Decision, I will refer to the immigration status of the individual's wife as "undocumented" or "without proper documentation."

⁶ The Counterintelligence Memorandum, provided by the LSO as Exhibit 4, summarizes information obtained from the individual and from the Department of Homeland Security (DHS) about his wife's immigration history and her lack of legal status. Ex. 4 at 1-2.

by U.S. immigration authorities and that she voluntarily returned to Mexico on two occasions. Ex. 4 at 2. The individual is aware that his wife has relied on the services of “coyotes” to help her cross the border illegally. Ex. 5 at 155, 212. He is also aware that she was detained at the border at least once, either in 2004 or 2007. Ex. 5 at 222-23.

Before the individual married his wife in May 2016, he knew that she was from Mexico. Ex. 5 at 203. However, he has asserted that before their marriage he did not consider and was not aware that she was residing in the United States illegally. Ex. 5 at 160, 202. In his PSI, he stated: “I didn’t ask, and it didn’t cross my mind.” Ex. 5 at 202. The individual stated that he learned of his wife’s immigration status in the summer of 2016, one or two months after their marriage, when one of her sisters mentioned that she needed to become legalized. Tr. at 14; Ex. 5 at 178-80. According to the individual, his wife’s sisters have legal status themselves. Ex. 5 at 173.

The individual’s wife does not work and is dependent on him for financial support. Tr. at 17; Ex. 5 at 216. She worked at a restaurant before their marriage. Tr. at 17; Ex. 5 at 141. Although she does not drive, she lived near her workplace and was able to walk there.⁷ Tr. at 17. Ex. 5 at 142. Since their marriage in May 2016, she has resided with the individual and has not worked because she has been without transportation. Tr. at 17-18. Ex. 5 at 142.

Within months of learning of his wife’s immigration status in mid-2016, the individual and his wife began exploring the possibility of obtaining legal status for her. Tr. at 31. They have consulted two immigration lawyers in Albuquerque. Tr. at 31-32. Her ability to obtain legal status may be complicated due to her deportation history. Tr. at 15; Ex. 4 at 2. Nevertheless, one of the attorneys the individual consulted with told him that it might be possible to obtain legal status for her. Tr. at 19. The individual and his wife have not initiated the legalization process because he believes it is prudent to first save the estimated attorney fees. *See* Tr. at 32. He has been told the process will cost about \$5,000 to \$7,000 and he has saved \$2,000 for this purpose. Tr. at 19, 29.

The individual has stated that he has never lied to anyone about his wife’s immigration status and that he has never taken any action to conceal her from immigration authorities. Ex. 5 at 244; Tr. at 33. During the hearing, he stated that his friends and coworkers know that she does not have legal status. Tr. at 21. He expressed that it is “no secret” that she is an undocumented immigrant. Tr. at 21. During the hearing, the individual testified that he loves his wife and would not divorce her to obtain a security clearance. *See* Tr. at 22-23. He is aware that she could be deported at any time. *See* Tr. at 33. He asserted that if she were to become a target of immigration enforcement, he would not try to conceal her. Tr. at 33. He recognized that “there is nothing we [she and I] can do” if that were to occur. Tr. at 20. He described himself as a “strong person” who cannot be blackmailed. Tr. at 21. He stated: “[T]here is nothing that’s going to change my mind about having my loyalty to the United States or where I live. Nothing will change that.” Tr. at 34.

V. Analysis

⁷ In her former job, the individual’s wife paid taxes and reported her earnings using a Social Security number. Ex. 5 at 145, 214-15. He believes she obtained the Social Security number because her father had worked in the United States under a guest worker program in the 1960s. Ex. 5 at 145, 221. The Counterintelligence Memorandum indicates that the Social Security number may be fraudulent. Ex. 4 at 2.

A. Guideline B

As noted above, security concerns can arise under Guideline B if an individual's foreign contacts and interests result in a divided allegiance or if they create circumstances in which the individual may be made vulnerable to pressure or coercion by any foreign interest. Guideline B also states that "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion" could raise a security concern and be disqualifying.⁸ Guideline B at ¶ 7(d).

In this case, I find credible the individual's testimony that he is loyal to the United States. I do not believe that his marriage has left him with any divided loyalties between the United States and Mexico. The greater risk, given the individual's marriage to an undocumented immigrant, is that he could be blackmailed or made vulnerable to pressure or coercion. I am persuaded that the individual loves his wife and is bound by affection to her. His provision of financial support to his wife is a demonstration of his commitment to her. It is within the realm of possibility that a hostile foreign agent could try to manipulate the individual or induce him to act in a way inconsistent with U.S. national interests by threatening to report his wife's status to immigration authorities.

Nevertheless, I do not believe that a threat to report his wife's immigration status is likely to be effective in this circumstance. First, the individual has testified that his wife's immigration status is already known to his friends and coworkers. He has not tried to conceal that she is undocumented. It is notable that the LSO has made no allegation that the individual attempted to hide information about his wife's status during the OPM investigation, his PSI, or on any other occasion; indeed, he appears to have been consistently forthcoming. His openness about her status suggests that he accepts the risk that she could be deported. Second, as shown in the Counterintelligence Memorandum, the DOE has contacted DHS to obtain information about the immigration status of the individual's wife. The Counterintelligence Memorandum shows that DHS indicated to the DOE that the individual's wife does not reside in the United States legally and is thus vulnerable to deportation. However, the individual has now received the Counterintelligence Memorandum showing that DHS has been consulted regarding his wife's immigration status. His awareness that this consultation with DHS has occurred makes him less likely to be susceptible to a threat to report his wife's undocumented status to that same agency.

Third, I am persuaded that the individual and his wife do intend to proceed with their efforts to obtain legal status for her. As soon as the process is initiated, she will have formally made DHS aware of her presence in the United States, which should reduce any security concerns that the individual could be blackmailed. If his wife is successful in obtaining legal status, the security concerns under Guideline B will be further mitigated. Finally, the knowledge that the individual has gained during this proceeding about the risks of blackmail and his stated loyalty to the United States, which I have determined to be credible, further mitigate any remaining security concerns under Guideline B. Accordingly, for all these reasons, I find it extremely unlikely that the

⁸ The Adjudicative Guidelines do not specifically include residing with, or being married to, an undocumented immigrant as a condition that could raise a security concern and be disqualifying. Further, merely cohabitating with an undocumented immigrant does not constitute criminal conduct. *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012); *See also United States v. Vargas*, 733 F.3d 366 (2nd Cir. 2013) (harboring an undocumented immigrant under 8 U.S.C. § 1324 (a)(1)(A)(iii), requires an intention to prevent the undocumented immigrant from being detected by immigration officials or police).

individual's close relationship with his wife will make him vulnerable to pressure or coercion by any foreign interest.

B. Guideline E

The LSO also raised security concerns under Guideline E regarding (1) the individual's provision of financial support to his wife despite his knowledge of her undocumented status; and (2) his continued association with her after becoming aware that she had been detained at the border at least once. It is possible that a close association with an undocumented foreign national, or support for such a person, could raise questions about an individual's own willingness to comply with rules and regulations, and could reflect negatively on an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. In this circumstance, however, I find that any concerns under Guideline E have been mitigated.

Guideline E provides that security concerns under Guideline E can be mitigated if the behavior "happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Guideline E at ¶ 17(c). Here, the individual's decision not to divorce his wife or stop providing financial support to her after he learned of her undocumented status and her detention by U.S. authorities should be considered in light of the uniqueness of their relationship. She is his wife. I am persuaded by his testimony that she is someone whom he loves. Due to the uniqueness of the spousal relationship, I do not believe that his decision to continue associating with her in this circumstance reflects negatively on his overall judgment reliability, trustworthiness, and ability to protect classified or sensitive information.⁹ Moreover, any decision to withhold financial support from his wife, or to divorce her and then withhold financial support, may itself have constituted an error in judgement by leading to additional violations of law.¹⁰ The individual's efforts to obtain legal status for his wife, by consulting with immigration attorneys and saving money for attorney fees, constitute a mature and measured response to his discovery that his wife is undocumented.

For the above reasons, I therefore find that the concerns that the LSO raised under Guideline E have been sufficiently resolved.

VI. Conclusion

In the above analysis, I have found that the LSO had sufficient derogatory information to invoke Guidelines B and E. However, after considering all the evidence, both favorable and unfavorable, in a common sense manner, I find that the individual has sufficiently mitigated the security

⁹ I am further persuaded that the individual was truthful when he stated that he did not learn of his wife's status as an undocumented immigrant until after their marriage. Perhaps the most questionable judgment displayed by the individual in this matter was in not inquiring about her immigration status prior to their marriage. This issue, however, was not raised by the LSO.

¹⁰ If the individual were to remain married to his wife and fail to provide her financial support, she might need to work in the United States illegally, without a work permit. Moreover, if the individual were to both divorce his wife and not support her financially, he could be in violation of a divorce agreement.

concerns raised under both these Guidelines. Accordingly, the individual has demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should be restored at this time. The LSO may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Gregory S. Krauss
Administrative Judge
Office of Hearings and Appeals